

plead

(5)
6/19/01
18m

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JEROME SMITH, : CIVIL NO: 1:CV-01-1026
 :
 Plaintiff, :
 : (Judge Rambo)
 v. :
 : (Magistrate Judge Smyser)
 UNITED STATES OF AMERICA and :
 FEDERAL BUREAU OF PRISONS, :
 :
 Defendants :

FILED
HARRISBURG, PA

JUN 18 2001

MARY E. D'ANDREA, CLERK
PER DEPUTY CLERK

REPORT AND RECOMMENDATION

The plaintiff, a federal prisoner proceeding *pro se*, commenced this action by filing a complaint on June 8, 2001.

The plaintiff's complaint contains a medical negligence claim under the Federal Tort Claims Act and *Bivens*¹ claims.

It is recommended that the plaintiff's *Bivens* claims be dismissed and that the FTCA claim against the Federal Bureau of Prisons be dismissed.

1. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

28 U.S.C. § 1915A provides, in part:

(a) Screening.- The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

Additionally, 42 U.S.C. §1997e provides:

The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

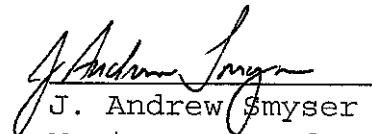
A *Bivens* action can be brought only against individual officials. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

In the instant case, the plaintiff's complaint does not name as defendants any individual officers. The complaint fails to state a *Bivens* claim against the United States or the Federal Bureau of Prisons.

The only proper defendant in a Federal Tort Claims Act case is the United States. See 28 U.S.C. § 2679; *Kennedy v. United States Postal Service*, 145 F.3d 1077, 1078 (9th Cir. 1998) ("the United States is the only proper party defendant in an FTCA action"). Thus, the complaint fails to state a claim based on the Federal Tort Claims Act against the Federal Bureau of Prisons.

By a separate order issued this date, we have directed the Clerk of Court to serve the plaintiff's complaint on the United States.

Based on the foregoing, it is recommended that the plaintiff's FTCA claim against the Federal Bureau of Prisons and the plaintiff's *Bivens* claims be dismissed pursuant to 28 U.S.C. §1915A and 42 U.S.C. §1997e and that the case file be remanded to the undersigned for further consideration.


J. Andrew Smyser
Magistrate Judge

DATED: June 18, 2001.

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	:	(Judge Rambo)
v.	:	
	:	(Magistrate Judge Smyser)
UNITED STATES OF AMERICA and	:	
FEDERAL BUREAU OF PRISONS,	:	
	:	
Defendants	:	

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MARY E. D'AMORE, CLERK
PER [Signature] DEPUTY CLERK

NOTICE

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3 of the Rules of Court, M.D.Pa., which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

[Signature]
J. Andrew Smyser
Magistrate Judge

Dated: June 18, 2001.

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

June 18, 2001

Re: 1:01-cv-01026 Smith v. USA

True and correct copies of the attached were mailed by the clerk
to the following:

Jerome Smith
FPC-ALLEN
Federal Prison Camp at Allenwood
19145-018
P.O. Box 1000
Montgomery, PA 17752

cc:

Judge	()	() Pro Se Law Clerk
Magistrate Judge	()	() INS
U.S. Marshal	()	() Jury Clerk
Probation	()	
U.S. Attorney	()	
Atty. for Deft.	()	
Defendant	()	
Warden	()	
Bureau of Prisons	()	
Ct Reporter	()	
Ctroom Deputy	()	
Orig-Security	()	
Federal Public Defender	()	
Summons Issued	()	with N/C attached to complt. and served by: U.S. Marshal () Pltf's Attorney ()
Standard Order 93-5	()	
Order to Show Cause	()	with Petition attached & mailed certified mail to: US Atty Gen () PA Atty Gen () DA of County () Respondents ()
Bankruptcy Court	()	
Other <u>Day am</u>	()	

MARY E. D'ANDREA, Clerk

DATE:

6-18-01

BY:

672
Deputy Clerk